SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, [illegible] PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, GERALD A. BROWN, [illegible]

Petitioners,

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondents.*

BRIEF FOR RESPONDENT

[illegible]

[illegible]

[illegible]

Counsel for Respondent

[illegible]

Washington, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 107

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (R. 51-67) is reported at 201 F. Supp. 82. The National Labor Relations Board's (Board) Decision and Direction of Election which are the subject of this suit (R. 31-41) are reported at 134 NLRB No. 25.

Jurisdiction

The final judgment of the District Court was entered on March 6, 1962 (R. 76-77), and an appeal therefrom was docketed in the United States Court of Appeals for the District of Columbia Circuit on April 9, 1962 (R. 80). A Writ of Certiorari was granted by this Court on June 11, 1962 (R. 82; 370 U.S. 915). The jurisdiction of this Court is founded on 28 U.S.C. 1254(1). *Leedom* v. *Kyne*, 358 U.S. 184 upholds jurisdiction in this case.

Statutes, Treaty, and Constitutional Provisions Involved

Provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 72 Stat. 945, 29 U.S.C. 151, et seq. (NLRA) set forth in the appendix of the Board's brief. Relevant provisions of the Treaty of Friendship, Commerce, and Consular Rights between the United States and the Republic of Honduras, dated December 7, 1927, 45 Stat. 2618 are quoted where cited in the text of this Brief. The Constitution of the United States; Section 8, Article I; Section 2, Article II; Article VI; and the Fifth Amendment.

Question Presented

Whether the NLRA grants the Board authority to order an election for the designation of a representative union for the purposes of collective bargaining on a Honduran flag vessel in derogation of the laws of Honduras, a treaty between the United States and Honduras, and international law and comity.

Statement

The District Court has permanently enjoined the Board from conducting an election for the designation of a representative for collective bargaining purposes among the

crewmen members of the Respondent Union, Sociedad Nacional de Marineros de Honduras (Sociedad), who man the Honduran registered ships of Empresa Hondurena de Vapores, S.A. (Empresa). The Board appealed this judgment but after the appeal was docketed therein, it petitioned and was granted a writ of certiorari to the Court of Appeals for the District of Columbia Circuit before hearing and judgment.

Sociedad is a labor union of unlicensed seamen organized over twenty years ago under the laws of the Republic of Honduras with offices in Puerto Cortes, Department of Cortes, Honduras.[1] It has obtained legal status to operate as a labor union because it has met the requirements of the Honduran Labor Code. It has been granted juridic personality under the authority and approval of the Honduran Labor Ministry which is required for a collective bargaining agent.[2] Its by-laws were submitted to the Minister of Labor for the required approval before they became operative.[3] Its managing officers are all Honduran citizens and possess the other special qualifications required by Honduran law.[4] Over 90 percent of its members, as Honduran law requires, are Honduran citizens.[5]

Sociedad has approximately 335 members who are all citizens of the Republic of Honduras with the exception of one member who is a Jamaican citizen. All but possibly four are residents of the Republic of Honduras. None of

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[1] The facts set forth herein unless otherwise indicated are taken from the Complaint and affidavits (R. 1-45).

[2] Honduran Labor Code at § 490. A translation of this Code is set forth in full text in the Brief *Amicus Curiae* of Republic of Honduras filed herein.

[3] Id., §§ 481, 483, 487, 488.

[4] Id., §§ 504, 510-513, 489.

[5] Id., §§ 475, 504.

the members or officers of Sociedad are citizens of the United States.

Under a collective bargaining agreement signed in the Republic of Honduras, pursuant to Honduran law, Sociedad furnished seamen to Empresa which owns and operates ten of its own merchant vessels and operates three others owned by Balboa Shipping Company, Inc., a Panamanian Corporation. Under time charter to United Fruit Company, these vessels make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of Canada, the United States and Europe. The vessels carry general cargo for shippers and consignees other than United Fruit, though the chief cargo is for the latter. The vessels also carry some passengers. All these vessels are registered under the laws of Honduras, have Puerto Cortes, or Tela, Honduras as their home port, and fly the flag of Honduras.

The seamen members of Sociedad are all employed in Honduras by Empresa under shipping articles executed in Honduras.

Collective bargaining agreements between Sociedad and Empresa have been in effect since 1942. Since Sociedad is the only Honduran union which the seamen employees of Empresa have chosen to join, Sociedad is their only collective bargaining agent.[6] The current contract between the union and Empresa is in effect until April 15, 1963.

The employer Empresa is an Honduran corporation, all the stock of which is owned by United Fruit Company, a

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[6] § 474 of the Honduran Labor Code prohibits a collective bargaining contract which makes membership in a union a condition for beginning or continuing employment. NMU's ignorance of this provision is demonstrated in its misconstruing of Sociedad's statement that it is the sole union recognized by the Honduran Government (R. 2) to mean that Honduran law requires exclusive recognition of Sociedad. (NMU Brief, 33).

corporation organized under the laws of New Jersey. Since the formation of Empresa in 1941, all of its officers and directors have resided in Honduras, and none of its officers or directors are employed by, or associated with United Fruit Company. At no time has Sociedad acted as a bargaining representative of employees of United Fruit Company. Nor has that Company ever participated in collective bargaining with Sociedad.

As the bargaining representative of Empresa's seamen, Sociedad and its members are forbidden by the Honduran Labor Code, from taking part in any activity which would have the effect of denying the authority and jurisdiction of the Honduran Government to regulate its labor relations.[7] The Government of Honduras advised the employer, Empresa, in a ruling dated December 8, 1961, that it regarded the action of the Board, in attempting to assume jurisdiction over Empresa and its unlicensed seamen and in directing an election of a union bargaining representative, as a violation of the sovereignty of Honduras, and null and void under its Constitution and laws (R. 24-30).

The Board's order dated November 15, 1961, in directing an election to be held for a union representative of the seamen employed by Empresa, upheld a petition of the National Maritime Union of America, AFL-CIO (NMU). The Board directed the holding of this election to determine whether the representation should be by NMU, another union known as Sindimar,[8] or by neither. To its order, the Board issued a Supplemental Notice providing:

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[7] §§ 469, 499(f), 500. The Constitution of the Republic of Honduras, Chapter II, Articles 116, 122, 132, declares that in enterprises of national interest, specifying the merchant marine, it is prohibited to renounce the rights and obligations imposed by law on those operating such enterprises. A translation of these provisions of the Constitution appears in the brief *Amicus Curiae* filed herein by the Government of Honduras.

[8] Twenty-two days after the Board's order herein which included an Honduran union, Sindimar, the Honduran Ministry of Labor handed down

"MAIL BALLOTING: All eligible seamen aboard Employers' ships which *do not* dock in ports of the United States between DECEMBER 17, 1961 and JANUARY 31, 1962, will vote by Mail Ballot, which will be mailed on JANUARY 15, 1962. *The deadline for return of Mail Ballots will be the close of business February 15, 1962.*

"COUNT OF BALLOTS: At the office of the National Labor Relations Board, 745 Fifth Avenue, New York, New York, on FEBRUARY 15, 1962, at 5:30 PM."

On November 29, 1961, the Government of Honduras, in an official Note to the Government of the United States (R. 42-45) protested the action of the Board as a violation of the Treaty of Friendship, Commerce and Consular Rights existing between the two nations since 1927 and of established principles of international law. It further specified that the assertion of Board jurisdiction over seamen on Honduran registered vessels was an intrusion into the internal order of the ships governed by Honduran labor laws; and requested remedial action by the United States.

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a ruling declaring that the effect of Honduran law is to forbid an Honduran union, or seamen aboard Honduran flag vessels from coming under the authority or power of a foreign agency, with respect to labor matters (Dec. 8, 1961). Eight days later, the injunction granted by the District Court herein stopped further activity in this case by the petitioning unions. That Sindimar presumably intends to abide by Honduran law made certain by the Labor Ministry's ruling is evidenced by the fact that since the injunction, Sindimar has not become a party to this appeal.

Just at the time when Sindimar was included in the election order in this case, the Board dismissed Sindimar as a union eligible for election in another case, *Hamilton Bros.*, 133 NLRB No. 85, saying: "The Board has been administratively advised that the Petitioner does not have an adequate showing of interest in the unit found appropriate and has requested permission to withdraw its Petitions for Certification of Representatives previously filed herein, and that the Employer has no objection to the withdrawal." In his dissent in *Hamilton Bros.*, Board Member Rodgers pointed out that Sindimar has never had a collective bargaining contract and that there was real doubt as whether it had any active members, or the kind of supervisory employees not permitted by the NLRA in an American union.

Subsequent to the filing of the Complaint by Sociedad in response to the District Court's request for the views of the Department of State on the Honduran Note, the Department of Justice advised the Court on January 10, 1962:

> "The Department of State informs me that, although the Department does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case." (R. 50).

The Respondent, Sociedad, was not a party to the National Labor Relations Board proceedings, and did not and could not participate therein because under the Honduran Labor Code it was forbidden to take part in any activity which would have the effect of denying the exclusive jurisdiction of the Honduran labor authorities.[9] Sociedad was not included in the Board's order as a union for which Empresa employees might vote as their representative.

The District Court held that the Board lacks jurisdiction to issue the Decision and Direction of Election at issue herein on the ground that the National Labor Relations Act confers no power upon the Board over foreign crewmen on foreign flag vessels. (201 F. Supp. 82).

Summary of Argument

I

A. On the high seas, the Board's order replacing Honduran labor law with United States labor law aboard vessels flying the Honduran flag violates categorically the centuries old and universally adhered to international law of flag state sovereignty. This law provides that "ships on the high seas are subject exclusively to the jurisdiction of the

[9] *Supra*, note 7.

State whose flag they fly . . . the same in extent as its jurisdiction in its own territory." *The S.S. "Lotus"*, P.C.I.J., Ser. A, No. 10. This rule of law does not countenance a novel United States rule of "contacts," a self-determined self-interest theory, to accomplish nullification by the United States of Honduran authority over vessels of Honduran registry on the high seas. The functional purpose of this universal rule is to codify a regulatory scheme which prevents conflict among nations by providing rules which are universally known and certain in content and application. The fact that nations who have transgressed the rule have been held to account for their violations demonstrates its strength. The Board's order would unsettle and destroy long standing international relations and expectations built upon this rule of international law.

B. The Board's attempt to acquire extraterritorial power all over the world over Honduran seamen is not only an illegal but an empty gesture. International law has long asserted a monopoly of physical power and control as the sovereign right of the flag state over the management of its vessels on the high seas. The control and regulatory authority of the flag nation on the high seas is complete and covers everything on the vessel everywhere and all that can affect the vessel and those on it. As a practical matter the Board's order cannot be effective. The flag state, Honduras, has the absolute right to forbid totally and to punish the individuals who in any way implement the requirements of foreign authority aboard its flag vessels on the high seas. That Honduras intends to exercise its rights and enforce its comprehensive labor code and exclude all other regulatory authority aboard Honduran flag vessels is officially clear in the record herein.

C. The rule of international law of flag state sovereignty has received consistent, unfaltering and repeated expression

and adherence by the United States Government and this Court. To destroy the mutual respect among nations for the law of flag state sovereignty on the high seas would create tension, chaos, irreversible conflict and retaliatory measures. It would nullify one of the basic and most widely accepted and effective rules of law of universal application in the world community. The regulatory scheme based upon this rule is essential to the continued avoidance of turmoil in the ever growing field of sea commerce, where, as was said in *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147, "the possibilities of international discord are so evident and retaliative action so certain." Reaffirmance of the rule by this Court is clearly called for on the facts of this case, and in reason and in law.

II

In United States waters, the United States has adopted and followed the rule of international comity which provides for non-interference in the internal order of labor relations aboard foreign flag vessels—a rule also universally followed by other nations. The Board bases its claim of authority on the kind of interferences allowed by the "internal order doctrine." However, the interferences permitted by that doctrine are prohibited on the high seas and are allowed only in foreign ports. And in foreign ports the internal order doctrine has always proscribed interference in labor relations. The Board's untenable suggestion of dual sovereignty aboard the vessels of Honduras is so clearly unworkable and illegal as to fall by its mere assertion.

III

The Board's reliance upon the broad general language of the NLRA as supporting its assertion of authority is directly rejected by the decisions of this Court requiring

a specific congressional intent clearly expressed to accomplish any nullification of the international law of flag state sovereignty. *Lauritzen* v. *Larsen*, 345 U.S. 571, 578; *Benz*, *supra* at 147. The Board argues that the NLRA does not specifically preclude its application to replace flag state regulatory power and that this is sufficient warrant for the Board's order. This flies in the teeth of those decisions of this Court which restate long articulated rules of statutory construction—rules which Congress is well aware of and rules which undoubtedly guided the Congress in adopting and amending the NLRA. *Lauritzen*, *supra*, p. 581. The Board seeks escape from these rules and claims support for its order in a far-fetched assertion that congressional approval of the "freezing" clause of the Landrum-Griffin Amendment to the NLRA in 1959 with respect to monetary standards of jurisdiction gave the Board power to enter the order here in question. That the Board must reach out to such extraordinary lengths, and desperately attempt to warp congressional intent out of context, demonstrates how totally lacking in foundation is the Board's jurisdictional claim.

IV

A. The Board rests its "national contacts" theory on *Lauritzen* v. *Larsen*, 345 U.S. 571, where the issue in the case was "choice" of the tort "law by which it should be judged," i.e., United States, Cuban or Danish. *Id.* at 583, 590. That case thus involved a problem of international comity only. No displacement of continuous regulatory power of a foreign flag nation—a problem of conflict with international law—was involved as in the instant case. In articulating a "contacts" test for the comity application of domestic law in a maritime tort case, this Court did not approve "national contacts" as a test for the occupation

of the labor relations regulatory field in nullification of international law of flag state sovereignty.

B. Since contacts can be changed at the will of any vessel owner, the unstable foundation of any rule arrived at by adding up the "national contacts" in each case is obvious. The courts of any nation whose nationals could conjure up a contact or contacts would be constantly flooded with cases asking that they weigh the sufficiency of United States or other nations contacts and assert control aboard vessels under their country's labor laws. The difficulty of the contacts theory as a standard for application of regulatory power is nowhere better demonstrated than the differences in the evaluation of contacts between the Board and the Circuit Court of Appeals in the *Empresa* case. From a viewpoint of law and practice the contacts theory therefore offers no basis for an elimination of the international law of flag state sovereignty.

V

A. The Board's order violates the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras which has been in effect since 1928. The Treaty requires full recognition of the sovereignty of each nation over vessels under their respective registry. Both nations have acknowledged this interpretation. Yet the Board insists on its own understanding, though it lacks any prior experience or expertise in foreign affairs. The Treaty obviously is intended to prevent such an interpretation limiting Honduran authority aboard Honduran flag vessels. There is no misunderstanding between the Government of the United States and the Government of Honduras as to the effect of the Board's order. The Executive Branch of the Government of the

United States rejects the Board's order as unlawful. That Branch under the United States system has exclusive power over foreign relations, and this Court gives great weight to its interpretation of treaty obligations. *Sullivan* v. *Kidd*, 254 U.S. 433, 442.

ARGUMENT

I

On the High Seas, the Board's Attempt to Extend the NLRA Aboard Honduras Flag Vessels Violates International Law.

The Board's unprecedented attempt to nullify the ancient rule of flag state sovereignty on the high seas and replace it with a novel United States rule of "contacts," a self-determined, self-interest theory, has no basis in experience, law or reason. The crux of this case lies in the clash of two governments' regulatory powers on the high seas. It is a collision caused by the Board's attempted extension of its authority aboard Honduran flag merchant vessels throughout the world. Under these circumstances history illuminates the sound basis for the world-wide regulatory scheme embodied in the law of flag state sovereignty. History demonstrates its impressive maturity, its acknowledged obligation, its functional utility, and the chaos and conflict which would be created by United States rejection of this law rule which codifies centuries of mankind's experience on the high seas. The District Court's decision supports the rule of flag state sovereignty. The Court of Appeals of New York in *Incres Steamship, Ltd.* v. *International Maritime Workers Union*, No. 33, and the United States Court of Appeals for the Second Circuit in *McLeod* v. *Empresa Hondurena de Vapores*, Nos. 91 and 93, both utilized the "contacts" theory in part as a basis for their respective decisions. Respondent Sociedad urges that, as the District Court found, the rule of

flag state sovereignty on the high seas is the correct foundation for a decision rejecting the Board's election order.

A. *The Board's Order Violates The International Law Of Flag State Sovereignty On The High Seas*

The Board's election order replaces Honduran labor law with United States labor law aboard Honduran merchant vessels flying the Honduran flag. This displacement is not only in United States waters but in all the seas and ports of the world where the Honduran vessels ply, including their home port in Honduras. This limitation imposed on Honduran authority over vessels of its flag and registry is a categorical violation of the principles of international law which specifically prohibits any nation other than that of the vessel's flag from exercising authority over its management on the high seas—beyond the jurisdiction of any nation's territorial waters.

This international law rule has been precisely declared by the Permanent Court of International Justice:

> "It is certainly true that—apart from certain special cases which are defined by international law—*vessels on the high seas are subject to no authority except that of the State whose flag they fly.* In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. . . . A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. . . . It follows that what occurs on board a vessel on the high seas must be regarded as if it

occurred on the territory of the State whose flag the ship flys."[10] (Emphasis supplied.)

The Permanent Court of International Justice summarized its determination of this principle of international law:

> "[I]t is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly . . . which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory."[11]

In practicing this rule all nations recognize that while the vessel is on the high seas only the flag nation may command, forbid, and punish the personnel on board and that the flag State is the only sovereign authority which may stop the vessel, or order its navigation, or direct its conduct in any matter to suit its purposes.[12] On the high seas, the flag State continues to control its vessel's total operations, both internal and external just as if it were within the national waters of its home port of registry. The flag State is the only State which possesses a monopoly of physical coercion and moral authority to maintain order aboard a

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[10] *The S. S. "Lotus"* P.C.I.J., Ser A., No. 10, (1927) reported in 2 Hudson, WORLD COURT REPORTS, 20, at 40.

[11] Id., p. 41. Even the dissents in this case are emphatic in their acknowledgments of this explicit principle of international law. Justice Loder, id., at 50; Justice Weiss, Id., at 54; Justice Nyholm, I.d., at 64; and Justice John Bassett Moore, the American member of the Court, Id., at 68, declared that: "It is universally admitted that a ship on the high seas is, for jurisdiction purposes, to be considered as a part of the territory of the country to which it belongs."

[12] For instance, before the declaration of the United States Naval Blockade of weapons to Cuba on October 22, 1962 the President of Honduras issued an executive order absolutely forbidding merchant vessels under the registry and flag of Honduras to enter Cuban ports and engage in any commerce with that country. Decree No. 1058. Tegucigalpa, D. C., 18 October 1962.

vessel while it is on the high seas. It is this exclusive sovereign power of a particular State which the flag signifies over a vessel on the high seas and which the Board's order attempts to deny to Honduras.

The assertion of United States labor laws aboard these foreign flag vessels on the high seas is necessarily a denial and derogation of the sovereign power of the flag State to apply its laws and regulate labor relations aboard Honduran flag ships.[13] Consequently, international law forbids a nation foreign to the flag of a merchant vessel to extend its laws and regulations to the conduct and relationship of employment among the officers and crew aboard the vessel while it is on the high seas. As a specific example, the Board's order requiring an election to be conducted on the high seas, and the return of ballots therefrom (*supra*, pp. 5-6) is an unquestionable violation of this international law.

The principle that the laws of a vessel's flag state shall control aboard the vessel while it is on the high seas, is the law of maritime operation which has existed from time immemorial. "From the beginning there seems to have been exercised extensive jurisdiction by the maritime Powers over their seamen, over their sea-borne commerce, over the ships flying the state flag, and over the relations, business and personal, between merchants and seamen. The Maritime Laws of Rhodes are the earliest laws of this sort record of which has been preserved."[14] Down to

[13] Even the assertion of a condominium of the labor laws of two sovereigns as the Board suggests in its Brief (p. 40) is a flagrant denial of the sovereign rights of the flag State over its vessels. As a practical matter, the enforcement of such a condominium within the confines of a single ship is unthinkable. Where dual state and Federal sovereignty has been urged, this Court rejected it as producing a "mischievous conflict." *Bethlehem Steel Co. v. New York Board*, 330 U.S. 767, 776, and "fraught with potential conflict," *La Crosse Tel. Corp. v. Wisconsin Board*, 336 U.S. 18, 25.

[14] Fenn, *Justinian and the Freedom of the Sea* (1925) 19 Am. Jour. Int. Law, 716, 717. "In considering the doctrine of the Justinian Law Books and the freedom of the sea, the first thing of importance which appears is

the Middle Ages, claims for jurisdiction were largely based on personal and family origin, and there was thereby, no condition for a legal conflict, nor any need for the legal assertion of the sovereignty of the flag State over its vessels on the high seas. When States began to justify their jurisdiction on a territorial basis, Bartolus of Saxoferrato who, in the 14th Century, first drew together our conflict of law principles, wrote that a hundred miles should be considered the limit of the territorial sea on which an adjacent State could exercise its jurisdiction, so that an offense committed in Pisan waters could be tried at Pisa.[15] As states began to exert their authority in terms of assertions of territorial jurisdiction, they naturally began to express their traditional exercise of full sovereignty over vessels flying their flags on the high seas as being the equivalent of the "territorial" rights of sovereign authority.

Hugo Grotius in 1625 wrote that although the sea was free, each nation acquired sovereign jurisdiction over waters which its vessels actually occupied and displaced.[16]

In 1758, Vattel described the principle of the sovereignty of the flag nation over its vessels on the open seas as an accepted, common and natural understanding among nations. He explained this sovereignty as being fully the equivalent of territorial jurisdiction. This clear principle of international law, Vattel declared, is not even disturbed

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that the earliest recorded statement in the form of law, that is, the text of Marcianus, preserved in D. 1.8 pr., and dating from the second century of the Christian era, does not signalize a break with the past. The states bordering the Mediterranean had been and continued to be accustomed to regulate and control by law their navigation and seaborne commerce." *Ibid.*, 725, 726.

[15] Cansacchi, L'Occupazione dei Mari Costieri (1936) 85. For a detailed history of sovereign authority limited to territorial waters see Fenn, *Origins of the Theory of Territorial Waters* (1926) 20 Am. Jour. Int. Law, 465, 475.

[16] Grotius, De Jure Belli ac Pacis, Book II, c. 3 § 13. Similarly, see Bynkershoek, De Dominio Maris, c. 3 (1702).

by the broad claims of dominion over the open seas, which were current in the dialogues of leading sea-power nations in his time:

> "For it is natural to consider the vessel of a nation a part of its territory, especially when they sail upon the free sea, as a State retains its jurisdiction over those vessels. And as, according to the commonly received custom, this jurisdiction is preserved over vessels, even over vessels in parts of the [high] sea subject to a foreign domination, all the children born in the vessels of a nation are considered as born in its territory." [17]

Modern international law jurists are even more precise in their assertion of the scope of this principle of flag sovereignty on the high seas:

> "States make certain rules for providing ships with their nationality, and authorizing them to fly their flags. There is, therefore, an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-State. It is under these laws that the captain exercises his authority and enforces it. The ship may be a chattel, a piece of movable property, but it is governed by special laws and her independence, while on the high seas, from any control other than that of the flag-State, is universally recognized. It is not necessary to think of her as territory." [18]

[17] Vattel, Le Droit Des Gens, § 216.

[18] Higgins and Colombos, The International Law of the Sea (2nd rev. ed., 1952) 195.

This principle is explained—as it was in the *Lotus* case, *supra*—as a necessary corollary to the principle of the freedom of the seas. Herbert Briggs gives recent authority to the same effect:

> "Expressed in negative terms, writes Gilbert Gidel, the principle of 'the freedom of the seas' means that no State can exercise authority over any vessels on the high seas except those flying its own flag." [19]

The unquestioned character of this rule of international law is succinctly stated by Lauterpacht:

> "The following rules of the Law of Nations are universally recognised, namely: . . . that all vessels with their persons and goods are, whilst on the open sea, considered under the sway of the flag State; . . . These customary rules of International Law are, so to speak, supplemented by Municipal Laws of the maritime States comprising provisions . . . concerning discipline on board ship and the relations between the master, the crew, and the passengers . . ." [20]

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[19] Gidel, LE DROIT INTERNATIONAL DE LA MER, I (1932), 236, 125, referred to in Briggs, THE LAW OF NATIONS (2d ed., 1952), 329. Similarly in accord: I Hyde, INTERNATIONAL LAW CHIEFLY AS APPLIED AND INTERPRETED BY THE UNITED STATES (2d rev. ed., 1947), 752; Twiss, THE LAW OF NATIONS (2d ed., 1888), 292-93; I Westlake, INTERNATIONAL LAW (1910), 191; Schwarzenberger, INTERNATIONAL LAW (3rd ed., 1952), 56; Lawrence, PRINCIPLES OF INTERNATIONAL LAW (7th ed., 1923), 211; Starke, INTRODUCTION TO INTERNATIONAL LAW (4th ed., 1958), 209; Wilson, INTERNATIONAL LAW (3rd ed., 1939), 122; Rienow, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL (1937), 22; Higgins and Colombos, *supra*, Note 19 at 202; Smith, THE LAW AND CUSTOM OF THE SEA (3rd ed., 1959), p. 61; Fenwick, INTERNATIONAL LAW (3rd ed., 1948), 311.

[20] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), 590-591.

The Board's scuttling of these hundreds of years of regulatory experience which has been codified into a consensus of legal obligations on the high seas in the delicate field of international law and relations would create utter confusion where expectation of order now prevails. Implementation of the Board's order would create doubt as to which law of the flag State would apply on vessels and which United States' law would apply aboard foreign flag vessels. And there is no universally accepted forum to resolve such conflict. The Board's argument (Brief, p. 52, et seq.) that its assumption of jurisdiction would not unsettle international relations in the light of these settled principles of international law, cannot be based on experience in foreign affairs or on reason and should be rejected by this Court.

B. *The Exceptions Confirm The Law of The Flag State Sovereignty And Demonstrate Its Universal Acceptance*

Nowhere is the international law principle of the sovereignty of a flag State over its vessels on the high seas more clearly defined as a universal proposition of mutual obligation and acceptance than in the exceptions to this law which have been very carefully circumscribed. And these exceptions reinforce Honduran jurisdiction over labor relations aboard vessels which fly its flag and repel the Board's attempt to impose its authority. Lauterpacht states that:

> "Although the freedom of the open sea, and the fact that vessels on the open sea remain under the jurisdiction of the flag State, exclude, as a rule, the exercise of the authority of any State over foreign vessels, certain exemptions exist in the interest of all maritime nations."[21]

[21] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), § 266, p. 603.

He lists only four: (1) the right of belligerents to blockade the high seas around enemy ports, and to visit, search and seize neutral merchant vessels for the cartage of cargo destined to aid their enemies;[22] (2) the right which public vessels of all nations have to visit vessels on the high seas which are suspected of piracy and request them to show their flag and credentials; (3) the right of "hot pursuit" by a nation after a vessel on the high seas which has apparently violated one of its laws while within its territorial waters, provided that the pursuit has been continuous and unbroken; and (4) international law grants the cruisers of every State the right to accost, arrest, and seize any foreign vessel sailing under its flag without authority.[23]

Explaining these same careful exceptions, Messrs. Higgins and Colombos in their extensive treatise on THE INTERNATIONAL LAW OF THE SEA, emphasized again:

> "When no such general interests [exceptions cited above] are involved, merchant vessels on the high seas remain exclusively under the administration, the criminal, the civil and the protective jurisdiction of their flag State. . . . The law of the flag is thus applicable to all

[22] In 1752, King Frederick of Prussia noted in a *Promemoria* to the British Government that the British action in confiscating cargo and taking control of vessels flying its flag on the high seas clashed with its sovereign rights which pertained to such vessels. The Prussian *Exposition des Motifs* argued that "the Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing as their taking such property out of the said vessels as to have taken it upon neutral territory." The answer of the British Government did not deny the Prussian assertion of sovereign rights over its flag vessels on the high seas. It argued that under international law of the sea, an exception has always been made to the respect due to flag sovereignty in permitting belligerents to accost and board and search all merchant vessels to determine whether they were carrying contraband cargo beneficial to their enemies. de Martens, CAUSES CÉLEBRES DU DROIT DES GENS, Vol. II, pp. 99-168.

[23] I OPPENHEIM'S INTERNATIONAL LAW (8th ed., Lauterpacht, 1955), § 266, pp. 603-05.

events which take place in the ship and are capable of producing legal effects."[24]

These are the only exceptions to the rule of international law which guarantees the sovereignty of the flag State over its vessels on the high seas. Other exceptions are only apparent, not real. The exercise of jurisdiction by nations other than the flag State on such matters in their courts as tort claims, property rights, and crimes involving their nationals aboard foreign flag ships on the high seas are merely assertions of jurisdiction which are not forbidden by international law over events that have occurred within the territorial boundaries of the foreign flag country. These acts of jurisdiction do not displace the authority of a sovereign to act similarly within its own jurisdiction. International law only forbids such foreign intervention within vessels of a flag State on the high seas as is forbidden within the boundaries of the flag State itself.

C. *The United States Government Has Always Adhered To the Law of Flag State Sovereignty*

It has been the traditional practice of the United States to acknowledge fully this principle of international law of flag State sovereignty on the high seas. In the year 1812, the United States was a small nation, but it fought an all-out war with Great Britian precisely in support of this principle of international law.[25] The British Government had adopted the practice of accosting merchant ves-

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[24] Higgins and Colombos, THE INTERNATIONAL LAW OF THE SEA (2 rev. ed., 1952), p. 202.

[25] See Message of President Madison recommending to Congress a Declaration of War, ANNALS OF CONGRESS, 12th Cong., Vol. 1, cols. 1624-1671, June 1, 1812. See Burt, THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICA FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812 (1940), pp. 305-16. See also Adams, HISTORY OF THE UNITED STATES OF AMERICA (1891), Vol. III, pp. 94, ff.

sels flying the flag of the United States on the high seas and searching them for seamen who appeared to be of British nationality and descent, and removing such seamen from the vessel.[26] Britain claimed its conduct was a proper exception to this international law principle in that they were exercising the right of a belligerent at war (with France) to search neutral vessels for contraband goods. They asserted that they were only looking for sailors of British descent who appeared to be under a current obligation to the British Navy. But such an assertion was not supported by the carefully circumscribed exception of belligerent rights to intervene in foreign flag sovereignty on the high seas.[27]

In that war, the United States succeeded in forcefully proclaiming its rights under this principle of international

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[26] Bemis has written that "submission to impressment marked the nadir of national disgrace in the history of American diplomacy." A DIPLOMATIC HISTORY OF THE UNITED STATES (4th ed., 1955), p. 146. And Mahan aptly remarked "the nation which endured [the impressment], content with reams of argument instead of blow for blow, had sunk beneath contempt as an inferior race to be cowed and handled without gloves by those who felt themselves the master." SEA POWER IN ITS RELATION TO THE WAR OF 1812. (1st ed., 1905) Vol. 1, pp. 114-128.

[27] The War ended when the British desisted in 1815 from this infringment of American flag State sovereignty on the high seas. But it was not until 1858 that the British expressed their abandonment of this interference as a right of a maritime power. In commenting on this renunciation, Lord Malmesbury was reported in The London Times, on June 18, 1858, to have explained in the House of Lords that: "He admitted the international law as laid down by the American Minister for foreign affairs, though not, of course, without being fortified by the opinions of the law officers of the Crown." (H. Ex. Doc. 7, 36 Cong., 2d Sess., 104, 105). Lord Lyndhurst also stated in the House of Lords on July 26, 1858 that: "Many persons . . . appear to think that . . . we have surrendered a most valuable and important right. The answer which I make to that is, that we have surrendered no right, for that, in point of fact, no right such as that which is contended for has ever existed. We have, my Lords, abandoned the assumption of a right, and in doing so we have, I think, acted justly, prudently and wisely." FUR SEAL ARBITRATION, Vol. XIII, 326-329.

law that the flag State has exclusive jurisdiction over merchant vessels on the high seas, and that it would not bow to even a momentary interference of even the greatest maritime power. In point of reality and principle, there is little difference between the British effort to impress American seamen on American merchant vessels on the high seas in 1812, and the attempt now of the Board to impress its jurisdiction on Honduran seamen abroad Honduran merchant vessels on the high seas. The United States is now the great maritime power. The Republic of Honduras, a small nation, protests now as the United States did in 1812.

Up to this moment, the assertion of this principle of international law of flag State sovereignty on the high seas has received consistent, unfaltering and repeated expression by the United States Government. Every period of its history is replete with examples of unhesitating assertions. In 1842, the Secretary of State, Daniel Webster, sent a note to the British Minister, Lord Ashburton, which fully reviewed this principle of international law and declared the official position of the United State Government:

> "A vessel on the high seas beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs and subjected exclusively to the jurisdiction of that nation."[28]

In 1879, Secretary of State Evarts, wrote to Mr. Walsh, Minister of England:

> "No principle of public law is better understood nor more universally recognized than that merchant

[28] Mr. Webster, Secretary of State, to Lord Ashburton, British Min., August 1, 1842. WEBSTER'S WORKS, Vol. 6, 303. Cited and approved in *United States v. Rodgers*, 150 U.S. 249, 264.

> vessels on the high seas are under the jurisdiction of the nation to which they belong . . . a part of the territory of the nation to which she belongs." [29]

Similarly, the Department of State, declared in a memorandum dated 1906:

> ". . . International law limits the sovereignty of a country to three miles from low-water mark, and although Mexican sovereignty follows Mexican vessels upon the high seas until they put into a foreign port, international law does not recognize Mexican sovereignty over a foreign vessel, or any right on the part of Mexico *to assume the incidents of sovereignty* upon a foreign vessel, beyond the three mile limit." [30] (Emphasis added.)

In 1922, Secretary of State Hughes stated that the United States Government is prohibited by international law from extending its domestic legislation on board vessels of foreign flags beyond American territorial waters:

> "I am constrained to say, however, that I consider that any attempt on the part of this Government to extend its domestic legislation to the high seas . . . would be in contravention of an established rule of international law and practice.
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> "Although a nation may give effect to its laws, with regard to its own vessels wherever they may be navigated, in my opinion the long-observed rule with regard

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[29] Mr. Evarts, Secretary of State, to Mr. Walsh, Minister to England, July 11, 1879, U. S. For. Rel. (1879), 435.

[30] The Opinion of the Solicitor of the Department of State, Oct. 2, 1906, Ms. Department of State, file 779/3.

> to the three-mile limit to territorial waters stands in the way of the application of domestic legislation over vessels of other nations beyond that limit."[31]

And in this very case the Department of State has reaffirmed this historical position.[32]

D. *Judicial Recognition Of The International Law Of Flag State Sovereignty*

Judicial recognition of flag State sovereignty over its vessels on the high seas has also received consistent and unqualified expression by this Court. In *United States* v. *Rodgers*, 150 U.S. 249, 264, this Court adopted the statement of Secretary of State Webster which simply paraphrased the words of Vattel: (*supra*, p. 17)

> "Speaking for the government of the United States, he [Sec. of State Webster] stated with great clearness and force the doctrine which is now recognized by all countries. He said: 'It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the [open] sea subject to foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations.'"

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[31] Letter of Secretary of State Hughes to Senator Sterling, August 16, 1922; Ms. Dept. of State, file 811.114/900.

[32] R. 50, and brief *Amicus Curiae* of the United States Government to the Board in this case. See *infra*, pp. 43, 51.

Then in *Maul* v. *United States*, 274 U.S. 501, 511, this Court stated that:

> ". . . The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for violation of its laws."

Mr. Justice Brandeis, in a concurring opinion in which Justice Holmes joined, also stated that:

> "There is no limitation upon the right of the sovereign to seize without a warrant vessels registered under its laws, similar to that imposed by the common law and the Constitution upon the arrest of persons and upon the seizure of 'papers and effects' . . ." (Id. at 524.)

While asserting the prerogatives of the United States under this rule of international law this Court has acknowledged respect for other nations rights of flag state sovereignty. It has held that a seizure by the United States of a foreign flag vessel on the high seas for a violation of United States municipal laws is invalid. Mr. Chief Justice Marshall in *Rose* v. *Himely*, 4 Cranch 241, 279.[33]

The highest courts of Great Britain and other nations have been equally clear in their acknowledgment of flag State sovereignty on the high seas.

In 1868, Justice Blackburn declared:

> "There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms part of that nation's country, and all persons on board of her may be considered as within the jurisdiction of that nation

[33] See also *The Antelope*, 10 Wheat. 66, 122, 123; The leading decision in the English Courts is *Le Louis*, 2 Dodson's Rep. 238.

whose flag is flying on the ship, in the same manner as if they were within the territory of that nation."[34]

Justice Blackburn then concluded his careful study:

"My present impression, however, is, that where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has a perfect right to legislate for all those on board . . ."[35]

E. *Beyond Its Violation Of International Law, It Is In Practice Impossible For The Board To Enforce Its Jurisdiction Aboard Honduran Vessels Beyond United States Waters.*

This attempt by the Board to extend and enforce United States labor laws aboard any foreign flag vessel on the open seas can unquestionably be defeated by the sovereign rights of Honduras, the flag State, under international law. The Government of Honduras has already by an enactment of law, and through the declarations of its Secretary of the Ministry of Labor and its Ambassador to the United States, announced its intention and present policy to exercise its sovereign authority through its own labor legislation aboard all vessels flying its flag.[36] Under these Honduran laws, it is illegal for any union not officially recognized by the Gov-

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[34] *Regina* v. *Anderson*, 1 L.R.C.C. Res. 161, 169 (1868).

[35] Id., at 170.

[36] See ruling of Honduran Secretary of the Ministry of Labor, R. 24, 29-30; Note dated November 29, 1961, from Ambassador of Honduras to Secretary of State (R. 42, 44). For a comprehensive description of Honduran Labor Laws see United States Department of Labor, Bureau of Labor Standards, Report No. 189 (1961), LABOR LAW AND PRACTICE IN HONDURAS. There the Labor Department official pointed out that the Honduran Labor Code "preempts many functions normally left to collective bargaining in the United States." p. 18.

ernment of Honduras to organize workers under its laws to aid such a movement.[37]

There is absolutely nothing the National Labor Relations Board can do to thwart acts of the Government of Honduras on the high seas, and this totally destroys the Board's ability to impress its jurisdiction aboard Honduran vessels. The United States Government would be clearly violating international law were it to attempt an interference. And in the usual case of such violation of flag State sovereignty on the high seas, the offending nation has been required by an international arbitration tribunal to give substantial sums in reparation and penalty to the offended nation. In rendering an award in favor of Great Britain against the United States for a violation of the law of flag State sovereignty on the high seas, an arbitration tribunal declared:

> "It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies." [38]

Mutual respect among nations for the sovereignty of the flag State is as much the *sine qua non* for peace and order on the expanses of the high seas, as such respect for sovereignty is the source of peace and order along the border of contiguous nations.

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[37] Honduran Labor Code, §§ 499 (f), 469.

[38] *The Jessie, The Thomas F. Bayard, and The Pescawha, Great Britain v. United States, Claims Arbitration*, 1921, NIELSEN'S REPORT, (1926), pp. 479-480.

II

In United States Waters Comity Requires Non-Interference in the Internal Management of Foreign Flag Vessels

Even though international law does *not* require that the United States refrain from interfering in the internal management of foreign flag vessels within United States waters, a universal practice of comity among nations has led it to exercise restraint. The practice of such comity has been consistently recognized by this Court and adhered to by the United States up to the time of the Board's order in this case. The classical statement of American practice was set forth in *Wildenhus' Case*.[39]

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship in a general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require."

This Court has accordingly acknowledged that international comity permits foreign vessels to carry the regulatory

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[39] 120 U.S. 1, 12. In accord: *Lauritzen* v. *Larsen*, 345 U.S. 571, 585; *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 123.

labor laws of their flag with them while within United States national waters. This Court has said:

> ". . . Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as a law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners . . ."[40]

The Republic of Honduras, throughout its history has similarly and consistently recognized this practice of international comity. The Republic has ratified and bound itself to the Bustamante Code of Private International Law adopted by the Sixth International Conference of American States (Habana 1928) which specifically affirms in Article 281 that:

> "The obligation of officers and seamen and the internal order of vessels are subject to the law of the flag."[41]

This Code has been ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Peru and Venezuela.

This rule of comity whereby nations refrain from extending their labor regulations aboard foreign flag merchant vessels within their national waters, is universally adhered to even though nations have labor laws which literally cover every enterprise within their territorial seas. If the Board should succeed in extending its jurisdiction in this case, it would be the first instance where the Courts of a nation

[40] *National Steam Navigation Co., Ltd. v. Dorr, et al.*, 105 U.S. 24, 30.

[41] 86 L.N.T.S. 254 (1929), 4 Hudson, International Legislation (1931), 2283 at 2321. Article XXII of the U.S.-Honduras Treaty also confirms this practice of comity. See Honduran Note to Sec. of State, R. 43, District Court opinion, R. 60.

have approved such intervention. Comity, as practiced by all nations, has never admitted such an interference in the field of labor relations. In such fields as safety, crime, health and payment of accrued wages there has been enforced interference on board foreign flag vessels in local ports. This interference has not included the field of labor relations—the regulation of collective baragining.

So strict has been the United States adherence to this practice of not interfering with the internal management of a vessel, that when a question of a statute's application to foreign flag vessels within national waters is raised, the courts refuse to so apply it unless this is shown to be the clearly expressed intention of Congress. See *infra*, pp. 32-34. In the case of *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, the Court applied the National Prohibition Act to foreign flag ships within national waters because it found that the statute specifically extended its reach to "the United States and all territories subject to the jurisdiction thereof." The Court felt compelled by the specification of the territorial reach of this Act to apply it to these vessels within the United States territorial waters. But in considering the similar applicability of the NLRA this Court found that its universal language did not show any indication or intent to have such a reach, and therefore the Court denied its applicability to foreign flag vessels within American national waters.[42]

In applying the comity principle of assessing contacts for choice of tort law to maritime injuries, the Court of Appeals of the Second Circuit has taken care to note that the comity principle practiced in "matters of 'internal management' are not involved in an action by a seaman to recover damages for injuries suffered through the negligence

[42] *Bonn* v. *Compagnia Naviera Hidalgo*, 353 U.S. 138, 147.

of a ship owner."[43] The comity standard for applying laws to the internal management of foreign flag vessels within a foreign port is totally different from that pertinent to maritime tort law.[44] This comity standard has never been and is not now conditioned on a consideration of "national contacts."

III

The Language of the NLRA and Its Legislative History Refute the Board's Claim of Power to Nullify International Law and Disrupt International Comity.

A. *The applicable canons of statutory construction require avoidance of conflict with international law and practice of international comity.*

The Board cannot dispute the fact that its order conflicts with international law which recognizes flag State sovereignty on the high seas and comity within national waters. This Court has held that such a conflict should be avoided unless Congress clearly and affirmatively expressed an intention to eradicate the particular international law rule in question. Congress in adopting the NLRA must be presumed to have acted with full knowledge of this canon of statutory construction which was established by this Court more than 150 years ago.

In 1804, Mr. Chief Justice Marshall said that, "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."[45]

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[43] *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927, 929 (2nd Cir., 1932), cert. denied, 287 U.S. 642.

[44] *Lauritzen* v. *Larsen*, 345 U.S. 571.

[45] *The Charming Betsy* (U.S.) 2 Cranch 64, 118.

Over a hundred years later, Mr. Justice Day said in construing American tariff laws:

> "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law." [46]

Forty years later, Mr. Justice Jackson said for this Court that the Jones Act by its terms applicable to "any seamen" could be said to literally cover every seaman in the world even "a hand on a Chinese junk, never outside Chinese waters." But the Court held the words of the Act were not intended to cover such foreign seamen and it would not be applied as the measure for recovery for injuries by a Danish seaman aboard a Danish flag vessel in Cuban waters just because he was hired in the United States. The Court said:

> "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." [47]

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[46] *MacLeod* v. *United States*, 229 U.S. 416, 434.

[47] *Lauritzen* v. *Larsen*, 345 U.S. 571, 577. See also, 1 Hyde, *supra*, note 19, p. 727: "The scope of the operation of a domestic statute, in a geographical sense, or with respect to the nationality of individuals or the character of ships to which it is applicable is determined by the will of the legislator. In the endeavor to ascertain its design, there may be reason to impute to the legislative body knowledge of the law of nations and the absence of a deliberate attempt to defy its injunctions."

And in 1958 Mr. Justice Clark for this Court emphasized the vital importance of adhering to this particular doctrine of construction for the very statute, the NLRA, to which the Board points as its authority:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[48]

Since the Board cannot and does not claim to have found an affirmative intention of Congress clearly expressed to support its contentions, its order must fall before the principles of international law and comity with which it conflicts.

B. *The NLRA and its legislative history contain no clearly expressed intent to authorize this order to nullify international law of flag state sovereignty.*

The Board contends that the literal language of the NLRA covers disputes involving foreign flag vessels (Brief p. 22 *et seq.*) and that the fact that the Act's language does not preclude its application allows its application (Brief p. 36 *et seq.*)

While the language of the NLRA is general and without specific indication that it intends to contravene the international law of flag state sovereignty on the high seas, it must be noted that it is the custom of most legislatures in the world (the United States Congress as well as the

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[48] *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147. Here serious constitutional questions are raised by the Board's interpretation of NLRA as authorizing its order (R. 5-6), making this a proper case for this Court to invoke the principle that where two constructions of a statute are possible the Court will adopt that construction of a statute which avoids questions of constitutionality. *Crowell* v. *Benson*, 285 U.S. 22, 62; *United States* v. *Wilkovich*, 353 U.S. 194, 202.

National Congress of Honduras) to write statutes governing labor relations in a general and generic language.[49] Such general language is commonly understood to cover all areas over which the nation actually exercises its sovereignty. So the legislative acts of both the United States and Honduras have been asserted over vessels flying their respective flags on the high seas. And it should be noted that in the two instances when the United States Congress departed from its use of universal language to legislate specifically as to labor matters between maritime employers and employees it specifically limited its legislative scope to American flag vessels and excluded vessels of foreign flags.

The language of the NLRA uses the customary literally universal terms in its definitions of the words "employer" and "employee" apart from specific exclusions which have no relevance here.[50] The term "labor organization" is defined with equal universality and has no exclusions.[51] Similarly, the Clayton Act of 1914, in limiting injunctive relief, also used the words "employer" and "employee" without limitations.[52] The definitions of the Labor-Management Reporting and Disclosure Act of 1959 continues the Congressional practice of writing definitions in universal terms into all labor legislation having only a domestic application.[53]

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[49] Honduran Labor Code §§ 4, 5.

[50] See. 2(2), (3), 29 U.S.C. § 152.

[51] See 2(5), 62 Stat. 137-138 (1948), 29 U.S.C. § 152(2), (3), (5).

[52] 38 Stat. 738 (1914), 29 U.S.C. § 52.

[53] See the definitions "Employer," "Employees," "Labor Disputes," and "Labor Organization" in P.L. 86-257, § 3.

The Board and Union also seek legislative sanction for the Board order in the words of the NLRA granting Board jurisdiction over matters "affecting foreign commerce." (Board Brief, pp. 22-23; NMU Brief, pp. 26-30.) This is obviously directed to the problem of a federal government in preempting jurisdiction over domestic enterprises engaged in foreign commerce from the jurisdiction of its various states. Even general language such as this when misapplied to indicate extraterritorial application will

Congress when it was specifically concerned with the application of its domestic labor regulations to seamen, showed itself conscious in this particular to impose limits expressly preventing labor legislation from extending to foreign flag ships. The Fair Labor Standards Act of 1938 defines "employer" as "any person" and "employee" as "any individual employed by an employer."[54] Under this Act all seamen, even American seamen, were exempted from the minimum wage and overtime pay provisions. When, under the Fair Labor Standards Amendments of 1961, Congress narrowed this exemption by extending a minimum wage to American seamen it specifically excluded foreign flag vessels and declared the Act only extended to American flag vessels. Section 3(p) of the Act, in the 1961 amendments, defines "American vessel" to mean precisely "any vessel which is documented or numbered under the laws of the United States."[55]

Similarly, when in the 1938 Amendments to the Merchant Marine Act of 1936 Congress turned its attention to specific labor problems of "maritime employers" and "maritime employees," it was as careful as it was in the Fair Labor Standards Act Amendments of 1961 to make these laws expressly inapplicable to "any vessel not documented, registered, licensed, or enrolled under laws of the United States."[56] This experience proves that when Congress has turned its specific attention to the labor problems of seamen it has specifically excluded foreign flag ships from the application of its legislation.

The experience here reviewed precludes any assumption

be construed to conform to international law which forbids displacement of another sovereign's authority within his own jurisdiction. Such literal language covers, for instance, a labor dispute in Zanzibar which halts the packing of cloves which is the United States' sole supply.

[54] 52 Stat. 1060 (1938); 29 U.S.C. § 203(d)(e).

[55] 75 Stat. 65 (1961); 29 U.S.C. § 203(p).

[56] 52 Stat. 965 (1938), expired, 55 Stat. 259 (1942).

that Congress might have intentionally included regulation of ships of foreign flags in the general language of any labor laws it has adopted. The Congress must be presumed to have legislated with full knowledge of the decisions of this Court requiring a clearly expressed intent before a statute is held to violate conflicting international law.[57]

Court interpretations of other statutes relating to the regulation of vessels have consistently excluded their operation over foreign flag vessels on the high seas. The Act prohibiting advances of wages to seamen was held inapplicable to a foreign ship with a foreign crew putting in at an American port, if the advances had been made outside the United States. Though the statute contained universal language, this Court inferred such an exception.[58] A law entitling seamen to receive one-half of accrued wages in every port that the ship entered, was held applicable to foreign ships while in an American port but only as to wages that had accrued.[59] This case, however, involved an application of the statute to require an action to be performed only within the United States. When this Court considered the application of a statute to activities beyond American national waters as in the *Sandberg* case,[60] the statute was held inapplicable.

The Eight Hour Law governing employment and Government contracts was held inapplicable to government work performed on American bases in a foreign country, even though the statute used the terms "every contract" and included no exceptions. This Court said:

> ". . . legislation of the Congress, unless a contrary intent appears, is meant to apply only within the ter-

[57] See *supra*, pp. 32-34.

[58] *Sandberg* v. *McDonald*, 248 U.S. 185.

[59] *Strathearn S.S. Co.* v. *Dillon*, 252 U.S. 348.

[60] *Supra*, footnote 58.

ritorial jurisdiction of the United States . . . An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." [61]

This Court has never held that use of all inclusive language of domestic labor regulation should receive extraterritorial application.[62]

Nor indeed does the legislative history of the NLRA indicate that there is any intention whatsoever to apply its regulation to foreign flag vessels. The voluminous legislative history is utterly devoid of any such hint that this might have been in the intent of either body of Congress in formulating this legislation. Certainly, the fact that when Congress dealt with the particular problems of maritime labor relations, in the 1938 Amendment to the Merchant Marine Act of 1936, three years after the enactment of the NLRA, it denied application of the legislation to foreign flag vessels, makes it crystal clear that Congress never intended that NLRA operate aboard foreign flag vessels either on the high seas or within the territorial waters of the United States.

Indeed, there are positive indications in NLRA's legislative history which refute the Board's position. This Court

[61] *Foley Bros. v. Filardo*, 336 U.S. 281, 285-86. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, is not to the contrary. There the Court upheld the application of the Fair Labor Standards Act to an American contractor performing work on a United States Government military base on territory outside the United States but subject to its jurisdiction pursuant to a very long term lease from the British Government. The Court found that the leased base was a "possession" under the Act to which Congress expressly intended the Fair Labor Standards Act to apply.

[62] See also, *The Apollon*, 22 U.S. (9 Wheat.), 362, 370-72; *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 198; *Sandberg v. McDonald*, 248 U.S. 185, 195; *Jackson v. S.S. "Archimedes"*, 275 U.S. 463, 467; *N.Y. Central R.R. v. Chisholm*, 268 U.S. 29, 31.

so found in holding that the sense of NLRA's legislative history was to restrict its application to the labor problems of American workingmen.[63]

The Board further claims (Brief p. 43) that the jurisdictional freezing clause of the Landrum-Griffin Amendment of 1959 to the NLRA enacted since the Taft-Hartley Act, provides authority under the NLRA for Board jurisdiction over foreign flag vessels.[64] The Board argues that since in the year prior to the enactment of these amendments, it asserted jurisdiction over foreign flag ships in the case of *Peninsular & Occidental Steamship Co.*, 120 NLRB 1097 (May 23, 1958),[65] this provision now grants a legislative seal of authorization and command to this and to every exercise of its jurisdiction prior to August 1, 1959.

This is erroneous for two reasons. *First*, this clause, 14(c) (1), is irrelevant to the scope of the Board's authorized jurisdiction. The purpose of this provision was to allow States to assume jurisdiction over labor matters in interstate commerce over which the Board although au-

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[63] *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 143-144.

[64] P.L. 86-257, § 701 added: "(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (73 Stat. 519 (1959))

[65] The Board's imputation in footnote 54, page 53 of its Brief that the Honduran Labor Code was formulated after its decision in this case is erroneous. The history of Honduran Labor Laws goes back to 1953 when the Ministry of Labor was established and machinery was set up to provide for government intervention in labor disputes. In 1955 a Charter of Labor Guarantees was enacted to provide a wide range of assurances for workers. This basic labor law was amplified and recodified under the 1957 Constitution, and this recodification was formulated before this NLRB decision. See LABOR LAW AND PRACTICE IN HONDURAS, Bureau of Labor Standards Report No. 189, United States Department of Labor (1961), p. 16 ff.

thorized to control, nevertheless declines to take jurisdiction. Congress in enacting the freezing clause of this amendment was merely declaring where matters are within the Board's authorized jurisdiction, the Board may not refuse to exercise the power if has been granted. This provision does not go to the scope of the Board's grant of power in any way. It goes to the question of the Board's *standards* of discretion stated in dollar amounts of commerce the Board will require in undertaking to exercise such authority as it already possesses.

Secondly, there is absolutely no comment in the lengthy legislative history on this provision to indicate that the question of Board jurisdiction over foreign flag ships had ever entered the Congressional consciousness. The provision was intended to cover an entirely different problem: to eliminate the "no-man's land" arising out of this Court's decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1.

Neither the House Bill (H.R. 8400) nor the Senate Bill (S. 1555) contained this jurisdictional freezing clause. It was first formulated in the Senate-House Conference. The House wished the States to have the power to exercise their own jurisdiction over matters which the Board refused to exercise its authority. The Senate wished to have the Board's jurisdiction actually enforced to the complete extent of its authority under the NLRA. The House prevailed, but the freezing clause proviso was added in the House-Senate Conference to freeze the monetary standard (i.e. $50,000 etc.) which the Board was then setting for the exercise of its authority, so that the people concerned would not be subject to a rapid expansion and contraction of these standards which had recently occurred prior to the time of the enactment of this proviso.[66] Thus, there is

[66] House-Senate Conference Report, H.R. Rep. 1147, 86th Cong. 1st Sess. (1959) pp. 36-37.

nothing in the meaning, the language, or legislative history of this Amendment in 1959 that could possibly lend credence to any notion that Congress had intended therein to extend the NLRA to foreign flag vessels.

Further, and most conclusively, this Court determined directly in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, that the NLRA, as amended in 1947, does not apply to picketing of a foreign flag vessel in an American port on behalf of foreign seamen so as to preclude a claim for damages in the State courts. In reaching its decision this Court said:

> "Our study of the Act [NLRA] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. . The whole background of the Act is concerned with industrial strife between American employers and employees. . . . What was said [in its legislative history] inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." (Id. at 143-144.)

So this Court itself having studied the NLRA and its legislative history has determined that it was never meant to apply to foreign flag shipping. But the Board claims that the *Benz* decision is narrowed by the Court's reference to the fact that the foreign flag vessel was only "transiently" in American waters (Brief p. 37). There is no need to stop to consider how any operating merchant vessel could be non-transient. Far from being a narrowing stricture on this decision, the Court reference suggests the absurdity of applying the Act to foreign flag shipping enterprises which only sporadically touch United States shores as well as the shores of many other nations. The Court's statement

of the inapplicability of the NLRA to foreign seamen on foreign vessels does not imply such a limitation. And if the NLRA as construed by this Court in *Benz*, *supra*, does not apply to a foreign flag vessel in an American port it is manifestly clear that it does not apply to such a vessel on the high seas.

Recently this Court in *Marine Cooks and Stewards* v. *The Panama Steamship Co.*, 362 U.S. 365, had occasion to refer to *Benz*, when the issue arose as to whether the Federal courts were denied authority by the Norris-LaGuardia Act from enjoining picketing of a Liberian flag ship docked in a United States port. The Court (in deciding that the authority of the Federal courts to enjoin had been taken away) held that Congress passed the Norris-LaGuardia Act only to curtail and regulate the jurisdiction of courts, not, as it passed the Labor-Management Relations Act (Taft-Hartley), to regulate the conduct of people engaged in labor disputes. And the *Benz* case, said the Court, decided that the Labor Management Relations Act does not govern labor relations on a foreign ship.

The United States Government in commenting on the *Marine Cooks* decision in its Brief Amicus to the Board in these cases now before the Court declared:

> "Thus, as recently as last term [October term, 1959] the Supreme Court has reiterated that Congress has manifested an intent that the Act directed at affording American workingmen new legal rights shall not be extended to cover foreign seamen on foreign vessels and the Supreme Court has refused to apply the Labor Management Relations Act to them."[67]

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[67] Brief *Amicus Curiae* of the United States Government to the Board, p. 5.

The Department of State also gave its opinion to the Board in this very case that:

> "The potentially serious international repercussions in the relations between the United States and those countries which could be created by such assertion of jurisdiction by the Board over ships flying the flags of those countries are clearly indicated by the diplomatic notes already received by the Department of State from those Governments on this subject. . . . Copies of these notes have previously been transmitted by the Department to the Board. . . . The assertion by the Board of jurisdiction over foreign flag vessels and the application to them of American labor laws would in many instances also be contrary to accepted principles of international comity."
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> "The Department of State considers that in the above connection, the Board should take particular note of the possibility that its assertion of jurisdiction over foreign flag vessels might invoke the enactment of defensive legislation or the taking of retaliatory action by the States affected."[68]

This confirms the basic fears voiced by this Court in *Benz* as to the disruptive and retaliative consequences of applying United States labor laws to foreign flag vessels. The single purpose of the NLRA is to serve to settle disputes among and between American employers and American employees which might disrupt American interstate and foreign commerce.[69] The Board is going beyond even the policy interests of the labor legislation under which it operates in the action it has taken here.[70]

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[68] *Id.*, pp. 26-27.

[69] *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-144.

[70] *Ibid.* See also 61 Stat. 136, 29 U.S.C. § 151.

IV.

The Board's Novel "Contacts" Theory Provides an Unprecedented Violation of International Law of Flag State Sovereignty.

The Board has asked this Court to adopt the principle that when a nation shall unilaterally determine that its self-interest has sufficient "contacts" with a foreign enterprise it can extend its domestic legislation to such foreign enterprise. For legal support of its "contacts" theory, the Board borrows the practice of comity of assessing nations' contacts for determining the choice of tort law to apply to maritime injuries affirmed by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571. The Board claims this case declares a legal principle that any nation is permitted under international law to extend the jurisdiction of its domestic legislation—such as regulatory labor laws—aboard any vessel wherever it goes, if it thinks the vessel's "contacts" with the nation are sufficient. The mere statement of the Board's position reveals its untenability. Yet, this "contacts" theory is the sole principle under which the Board claims that its action is legally justified (R. 33).

Sociedad urges that this "contacts" theory is misapplied by the Board for two reasons: (1) Its use here is itself a violation of international law; and (2) United States law makes it inapplicable to this situation.

International law of flag state sovereignty does not countenance any criteria of "contacts" as to when and where it might be applicable, i.e., diminishing or derogating such sovereignty according to the number of foreign contacts under its jurisdiction. The contacts theory cannot be a principle ordained by international law. A self-assessed criteria of self-interest denies the very concept of

legal obligation. Neither the United States nor any other nation can decide to heed international law only when sufficient contacts or interests of the nation are not involved.

Such notions are clearly contrary to the judgment of this Court in *Lauritzen* on which the Board solely relies. The contacts theory was stated in *Lauritzen* not as a rule of international law but as a proposition of comity for choosing the law of liability to be applied to maritime torts. The Court clearly was not entertaining the question of one nation displacing the regulatory authority of another sovereign aboard ships under its registry and flag, for the Court emphasized that the law on shipboard "cannot change at every change of waters." (*Id.* at 585.)

This Court in *Lauritzen* carefully confined its contacts theory to conflicts in international maritime tort jurisdiction. This court recognized that in maritime practice the choice of which nation's tort laws apply is only a matter of comity and has never been the subject of a universal and uniform prohibition to states which is the substance of international law:

> "International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own."[71]

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[71] *Lauritzen* v. *Larsen*, 345 U.S. 571, 582; see also on "contacts" as comity *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383.

This declaration can only mean that this Court found no international law question involved in this matter of maritime tort comity application and that the weighing of "contacts" in the decision in *Lauritzen* is not at all concerned with international law, only the practice of international comity in the tort field.

The international conflict of law on tort liability rules is a matter of comity which is indeed slight as compared to a matter of international law and obligation respecting the sovereign prerogatives of a flag state on the high seas. Dual sovereignty has already been condemned by this court as unworkable, *supra*, at note 13. To inject Board jurisdiction over Honduran merchant vessels displaces Honduran regulatory power and brings two nations into a continuous conflict. No such displacement of governmental power and conflict occur in appplying law in a tort case.

There is no international law which prohibits a nation from applying its tort liability rules or legislation to incidents occurring in the territory of another state in an action in its own courts. Such application does not diminish and therefore does not unlawfully derogate the power of a nation over its area of sovereign authority as would the assertion and intrusion of foreign labor regulations. Thus, courts do not find themselves prohibited by international law from extending the Jones Act to tort claims of a foreign seaman arising out of occurrences aboard a foreign flag vessel on the high seas or in foreign ports.[72] The Court in *Lauritzen*, *supra*, would *not* have violated international law if it had applied the Jones Act in that case.

The basic principle is that a nation can exert only as much jurisdiction with respect to matters occurring aboard

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[72] On the high seas, *Carrol* v. *United States*, 133 F. 2d 690 (2 Cir. 1943); and in foreign ports, *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, S.A. 168 F. Supp. 236 (S.D. N.Y. 1958).

foreign flag vessels on the high seas as it can, with specified exceptions, over matters occurring within the boundaries of the flag state itself.[33] That nations do restrain themselves in application of their tort law to extraterritorial occurrences is a matter of comity which considers the desirability of reciprocity on a basis of accommodation to their notions of due process as well as the nation's interests.

The "contacts" theory, therefore, is not the law which United States Courts apply to problems of international law conflict with an extraterritorial extension of regulatory legislation. This "contacts" theory is merely a description of the international comity practiced by the United States and its courts in maritime torts. It has nothing to do with settling questions of legal obligation under international law.

The "contacts" theory as a criteria for extraterritorial application of the United States labor laws is an unworkable theory of legal obligation. A foreign enterprise, if necessary, can change the relative "weight" of its contacts with the United States, escape jurisdiction thereby and still pursue the same course of business. The Board has urged that the key United States "contacts" in the extension of its labor laws is substantial American beneficial ownership, and substantial activity in United States foreign commerce. Such contacts in this case or any case can be easily altered.

The possibilities are manifold for changing contacts. And, it is not only a deliberate attempt to alter such contacts which could defeat Board jurisdiction but also the very exigencies of changing commercial conditions could cause a varying of contacts without any intended purpose of a shipping company, other than to pursue a profitable carriage wherever it might be found.

[33] Cf. discussion, *supra*, pp. 13-21.

Each time the contacts would vary, the shipping company would be uncertain as to whether they still were considered within the jurisdiction of the Board, and the seamen's unions would be put in an equally tenuous position. Law and order is hardly served by such doubt and uncertainty. Under such churning clouds of destructive doubt it would be impossible for any union to serve its members effectively.

Each time the contacts would vary, the shipping company and the unions could challenge the Board's jurisdiction. An appeal to the courts would most certainly follow. This Court would be constantly called upon to decide—on varying facts—whether the Board properly determined the sufficiency of contacts for the extension of United States labor laws. Illustrative of the difficulties are the differences in findings on the same facts between the Board and the Courts in the very cases here before this Court. The Board's contentions that the United States Circuit Court of Appeals for the Second Circuit added the contacts up incorrectly and weighed them wrongly (Brief, pp. 54-59) is typical of the constant problems which abandonment of the rule of law of flag state sovereignty will cause. What are "substantial contacts" and when do they "outweigh" foreign contacts are uncertain issues of endless potential to foster international disputes and ill will. It is obvious that the courts of other nations would follow United States courts and decide when self-interest required extraterritorial application of domestic regulatory laws. The equally obvious charges of bias would guarantee turmoil and retaliation [74] in maritime relations as decisions of different nations boomeranged upon each other. This court has observed in *Lauritzen* in that "a multiplicity of conflicting and

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[74] *Benz* v. *Compania Naviera Hidalgo*, 335 U.S. 138, 147.

overlapping burdens would blight international carriage by sea."[7]

V

The Board's Order Deposing Honduran Nationality Over Vessels Under Its Registry Is Prohibited Both By a Specific Treaty Agreement and International Law.

The only way in which the Board could extend United States labor laws to Honduran flag vessels on the high seas and within United States national waters without violating the international law of flag state sovereignty on the open sea and the practice of comity in foreign ports would be to establish United States rather than Honduras as actually the flag state with respect to these vessels. This is forbidden by express terms of a Treaty between the two nations, and international law which makes conclusive the nationality of a vessel's registry.

A. *The United States Treaty With Honduras Prohibits Board Displacement Of Honduran National Authority Over Vessels Under Its Registry*

The assertion of Board jurisdiction in this case is precisely the sort of claim which the United States and the Republic of Honduras have agreed by express stipulation of treaty not to press against each other. The Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618 (1929) provides in Article X:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws

[7] 375 U.S. 571, 581.

> in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

Thus, it is pointedly in this particular that the United States and the Republic of Honduras have formally agreed that they will not challenge each other's flag status over their vessels and thereby alter their sovereign rights and obligations under international law. Under this treaty, the Board can no more usurp the prerogatives of Honduras as the flag state over its vessels than the Republic of Honduras can deny its obligations and responsibilities to the United States for the conduct of these vessels by merely asserting that American citizens rather than Hondurans own the stock of the ship-owning company. In the face of this treaty any rationale fails which claims that because of beneficial ownership in an American company, these are American, not Honduran vessels.[76] The very purpose of the treaty agreement is to make a vessel's registry settle the question of conflicting assertions of national interest governing a single vessel. All disputes as to which sovereign shall exercise authority and accept responsibility for a particular vessel are thus settled by this Treaty.

The Board's claim (Brief pp. 44-46) that all this treaty means is the right of the nation of registry to label the vessel with its nationality and yet not subject the vessel to its national sovereign authority is fatuous. It is a singular

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[76] After studying similar provisions in over 150 separate treaties, Hawkins concluded: "Under such treaty provisions, nationality of the vessel is determined solely by the state of registry irrespective of the nationality of the owner." Hawkins, COMMERCIAL TREATIES AND AGREEMENTS (1951), p. 6. Walker summarized his study: "A vessel by definition, is deemed to have the nationality of the country whose flag it lawfully flies, without reference to such questions as who owns it or where it was built . . ." Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Amer. Jour. of Inter. Law, 373 at 382 (1956).

effrontery when the Board persists in its opinion after it was advised by the responsible agencies of both governments that the Board's view of their agreement is erroneous.

The Republic of Honduras has unequivocally protested this attempt by the Board to extend its jurisdiction aboard its flag vessels as being in categorical violation of this Treaty (R. 42-43). And the United States Government taking note of the Board's action in this case has just as flatly concurred:

> "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1950 to the Attorney General . . . create serious difficulties in our foreign relations not only with the nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize a flag of the ship as a violation of the rules of international law upon which there had been mutual reliance." [77]

Indeed, this firm protest by Honduras is no less vigorous than the protest it received in 1909 at the hands of the United States Government on this same matter. In a moment of zealous concern for its maritime affairs, the Republic by decree imposed the status of Honduran flag sovereignty on all vessels owned by individuals residing in the Republic, natives or foreigners.[78] The United States im-

[77] Brief *Amicus Curiae* of the United States Government to Board, p. 11. See also State Department Regulations 22 C.F.R. §1.110, §1.12.

[78] The Honduran Decree read: "All vessels built in the shipyards of the Republic, or of foreign construction, for the service of individuals residing in the Republic, natives or foreigners, will be considered as Honduranean, and, therefore, cannot fly any other flag." Cf. *Ronoor*, *supra*, note 19, p. 106.

mediately sent a strong note protesting this action which is identical to the ruling which the Board now seeks to impose on the Republic: An assertion of flag state sovereignty over certain vessels beneficially owned by persons of its own nationality, regardless of the fact that they are under the flag of another nation. The United States Government declared with considerable indignation:

> "... if the rather obscure provisions of the Honduranean decree be given the sweeping scope which the words, taken literally, might seem *prima facie* to indicate, the decree would appear to cover vessels holding an American or other foreign registry. If so interpreted, the decree would be clearly violative of the principles of international law and in derogation of the respect due American registry." [79]

The Republic shortly thereafter repealed this decree. The Government of Honduras now emulates the concern of the United States and has agreed with it that such action is violative of international law. But since this incident in 1909, the United States and the Republic of Honduras have come to an even closer understanding and mutual commitment to this principle. By treaty each has given the other a solemn promise not to question the flag state status of vessels bearing their registration. This obligation is a part of the supreme law of the United States.[80]

Though fully cognizant that it is dealing with ships of Honduran registry flying the Honduran flag and subject to this Treaty agreement, the Board resolutely has taken the view that it may disregard the provisions of the Treaty and determine for itself "whether or not the shipping involved is essentially that of this nation and not that of a foreign

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[79] *U.S. For. Rel.* (1909) 367, 368.

[80] U.S. Constitution, Article VI.

nation which the exigencies of international trade have brought in contact with the United States." (Board decision, R. 31, at 33). Driving its error home, the Board said: "we re-emphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations." (Id. at R. 34.)

B. *This Court's Decisions Reject the Board's Treaty Interpretation*

This Court has never depended upon the pronouncements of a government agency such as the Board to determine the meaning of a treaty as against the expressed declarations of both states involved. This Court said many years ago that where the parties to a treaty have expressed themselves clearly "[t]here is no room here left for interpretation."[81] Thus, the Board's position stands in direct contradition of the obvious and common sense principle of treaty interpretation expressed by Vattel in 1758:

> "The first general maximum of interpretation is, that it is not allowable to interpret what has no need of interpretation. . . . to go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to elude it."[82]

Where treaties are concerned, it is a fully established rule of construction in this Court that "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[83] Thus, the NLRA which was enacted subsequent to the 1927 treaty now in force between the United States and Honduras must be interpreted in

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[81] *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 70.

[82] Vattel, LE DROIT DES GENS, § 263.

[83] *Cook* v. *United States*, 288 U.S. 102, 120.

accommodation to a previous treaty unless there is a clear warrant to the contrary in its language and legislative history. That there is no such clear warrant in NLRA language, legislative history, or statutory context has been amply demonstrated, and effectively decided by this Court. (See discussion *supra*, pp. 34-42.)

This Court in cases such as this which require construction of treaties has always given great weight to the interpretation made by the Executive Branch of the particular treaty obligations of the United States Government. This Court has said:

> "While the question of the construction of treaties is judicial in its nature, and the courts, when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."[34]

The United States Government's position that no Board jurisdiction exists to issue the order complained of herein in violation of a treaty has been made clear before the Board, the District Court and this Court. (R. 59; Briefs of the United States Government before the Board and this Court).

C. *The Board's Order Violates International Law Which Makes the Nationality of a Vessel's Registry Conclusive*

But if the United States and Honduras had not agreed by treaty to recognize their respective sovereign rights

[34] *Sullivan* v. *Kidd*, 254 U.S. 433, 442. This consideration stressed in *Kolovrat* v. *Oregon*, 366 U.S. 187, 194, and *Factor* v. *Laubenheimer*, 290 U.S. 276, 294, 295.

and obligations as flag states, the attempt of the Board to assert its jurisdiction and to claim in effect that the Honduran vessels of Empresa are actually American flag ships, by reason of ownership of the stock of the Honduras shipping company by an American corporation, would be asserting that which is completely alien to the law and practice of nations.

Such a conclusion was upheld (with the United States supporting the argument) in a recent opinion by the International Court of Justice when it specifically rejected the nationality of the shareholders of companies owning ships as a criteria of evaluating the ship-owning rank of a nation, saying:

> "To take into account the names and nationalities of the owners or shareholders of shipping companies would, to adopt the words of the representative of the United Kingdom during the debate which preceded the election, 'introduce an unnecessarily complicated criterion.' Such a method of evaluating the ship-owning rank of a country is neither practical nor certain. Moreover, it finds no basis in international practice, the language of international jurisprudence, in maritime terminology, in international conventions dealing with safety at sea or in the practice followed by the Organization itself in carrying out the Convention. On the other hand, the criterion of registered tonnage is practical, certain and capable of easy application."[85]

This Court has also recognized that any attempt to categorize the flag status of a ship by the nationality of its

[85] *Re: Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, Advisory Opinion*, June 8, 1960, I.C.J. Reports 1960, 150 at 169; 1960 Am. Mar. Cas. 1005 at 1027.

owners is completely alien to any understanding or practice of the United States:

> "The Merritt is not a vessel of the United States .... That she was owned by citizens of the United States did not make her a vessel of the United States. By the statute of 1792 ... only ships which have been registered in the manner therein prescribed shall be denominated or deemed vessels of the United States .... The documents a vessel carries furnish the only evidence of her nationality."[86]

Further, this Court declared in the *Lauritzen* decision that as a matter of international law, to which the United States has firmly adhered, the flag state status of a vessel is conclusively determined by the national character of its valid registration papers, as determined by the flag State:

> "*Law of the Flag.*—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."[87]

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[86] *The Merritt*, 84 U.S. (17 Wall) 582, 586. For the leading incident in which the United States Government declared its commitment to this principle, see *The Virginius*, Moore, Dugest, II 895; U.S. For. Rel. (1874) pp. 1035, 1074.

[87] *Lauritzen* v. *Larsen* 345 U.S. 571, 584; Further authorities in support of this rule as a proposition of international law: *The Muscat Dhows Case* (*France* v. *Great Britain*), 1905, The Hague Court Reports, 93, 96, 99

Finally, it should be noted the Board cannot adopt an argument for one purpose which it repudiates for another. The Board cannot claim that Empresa's vessels flying the Honduran flag are nevertheless substantially American flag vessels or effectively American flag vessels, and therefore United States labor laws are applicable to them; and then turn later in its argument and say that it is *not* claiming them to be American vessels in any manner in its application to them of United States labor laws, and therefore, the treaty guarantee of mutual respect for flag nationality is not violated at all. (Board's Brief, pp. 44-46). The Board can hardly plead in argument that which it argues to reject.

It should also be noted that if the Board is successful in establishing for the purpose of American law, that these vessels are effectively ships of American flag status, then 75 per cent of Sociedad's members would be immediately subject to being fired from their jobs because another United States law requires the crew of vessels considered to be under American flag jurisdiction to be composed of at least 75 per cent American citizens.[*] Such are the intolerable conflicts created by the Board's order which put Honduran seamen under an irresolvable contest of two sovereigns' regulatory powers.

There is therefore no warrant in law or reason for the flagrant violation of the Treaty and international law by the Board's order.

(Scott ed. 1916); Wilson, International Law, 125 (3rd ed. 1920); Oppenheim's International Law, 225 (8th ed., Lauterpacht, 1955); Hyde, 1 and 2 (2nd rev. ed. 1945); Kenney, The Test of the Nationality of a Merchant Vessel, 29 (1937); 42 FR, 73-75, 79-116, 187; 1 Hyde, supra, note 19, p. 819; Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), 201-276.

[*] 46 USC 672(a). See the similar requirement of the Honduran Labor Code where a 90 per cent Honduran citizenship is required. p. 240. See *Hawaiian Fishing Fleet v. United States*, 282 U.S. 181, 191-192, where aliens were held to be protected in their contract rights by the due process clause of the Fifth Amendment.

Conclusion

The judgment of the District Court in this case should be affirmed.

Respectfully submitted,

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